FILED
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IN THE SUPREME COURT
OF THE UNITED STATES

NO. 79-1605

J. C. MOODY, Assistant Superintendent of Glades Correctional Institution, individually, and in his official capacity.

Petitioner,

vs.

JOHN P. McNAMARA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

JIM SMITH
ATTORNEY GENERAL

BRIAN E. NORTON
ASSISTANT ATTORNEY GENERAL

The Capitol - Suite 1501
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JURISDICTION

Petitioner requests this honorable Court to issue a writ of certiorari to review the decision below in this cause by the United States Court of Appeals for the Fifth Circuit. The Court of Appeals rendered its decision on November 15, 1979, which decision is reported at 607 F.2d 621 (5th Cir. 1979). A copy of this decision is attached in the Appendix-Exhibit A . The Court of Appeals issued a mandate on December 7, 1979, which mandate was withdrawn and stayed pending a resolution of this petition for writ of certiorari.

Respondent filed a civil rights conplaint pursuant to Title 42 U.S.C. §1983, against Petitioner and another subordinate prison official, both in their official and individual capacities. The district court granted summary judgment and compensatory damages against Petitioner personally in the sum of one dollar plus costs and attorneys fees. In addition, equitable injunctive relief was ordered against Petitioner (or any successor in office) in his official capacity. (Appendix-Exhibit B)

On appeal, the circuit court affirmed the judgment below. However, one of the three circuit court judges entered a lengthy dissent contending that the district court's award of attorney's fees against Petitioner in his individual capacity, without any showing of willful or reckless disregard for the Plaintiff's rights was incorrect and contrary to Congressional intent and in conflict with

prior holdings of the Supreme Court and other circuit courts of appeals. This Court has jurisdiction to review this case pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

Whether the Civil Rights Attorney's Fees Awards Act of 1976 authorizes an award of attorney's fees against a state officer in his individual capacity without any showing that the violation of civil rights was done willfully, with unreasonable disregard for the Plaintiff's rights.

Whether the Petitioner-state official should be held liable in his individual capacity for discretionary acts and decisions performed pursuant to his official capacity, without any showing of willfulness or unreasonable disregard for the Plaintiff's civil rights.

Whether the Plaintiff-Respondent's civil rights were violated by Petitioner's decision to refuse mailing of Plaintiff-Respondent's letter containing outrageous, vulgar and libelous statements about perverted sexual acts from the prisoner to a person on the outside.

STATEMENT OF THE CASE

Plaintiff-Respondent was a prisoner in the Florida prison system. He instituted a suit against Petitioner alleging Moody

and another state officer had wrongfully prevented him from mailing certain letters. The letter censored by the Petitioner, in his official duties as assistant superintendent of the correctional institution, stated that another prison officer who duties included reviewing inmate mail, engaged in masturbation while reading this mail and had sex with a cat. The Petitioner determined that the letter was "in poor taste" and returned it to the Plaintiff with a warning that any future attempts to send similar letters could lead to disciplinary action against him.

The district court found that the Petitioner's actions violated the Plaintiff-Respondent's civil rights, because the censorship did not further any substantial governmental interest. However, the trial court found that there was no evidence presented that such censorship was done willfully, with reckless disregard for the Plaintiff's civil rights. In spite of this finding, the district court entered a judgment for compensatory damages, in the amount of one dollar, against Petitioner in his individual capacity. No damages were awarded against Moody in his official capacity, because of the court's conclusion that recovery from the Defendant in his official capacity would be barred by the Eleventh Amendment. The district court also assessed court costs and attorney's fees against the Petitioner-Defendant in his individual capacity, pursuant to the personal judgment for damages against Petitioner.

The circuit court entered an opinion setting forth in detail the facts involved in this case, and including as footnotes the censored correspondence. The circuit court concluded that the inmate's letter should not have been subjected to censorship by the state prison officials. The circuit court further rejected Petitioner's claim that he was protected from an award of damages against him by qualified immunity for acts performed in his official duties with a good faith belief, based upon reasonable grounds, of their legality. The circuit court also upheld the award of attorney's fees against Petitioner in his individual capacity by virtue of the award of compensatory, nomimal damages. The court rejected the argument that such an award of attorney's fees could be predicated only upon proof of subjective bad faith on the part of the individual state officer.

One member of the panel disagreed and filed a dissent on the issue concerning the award of attorney's fees. That dissenting opinion analysed the Congressional intent in enacting the 1976 amendment to 42 U.S.C. §1988, and concluded that attorney's fees against a state official in his official capacity may be awarded only upon proof of the "bad faith" standard recognized by the United States Supreme Court in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). The dissent also determined the present decision by the circuit court conflicts with Hutto v. Finney, 437 U.S. 678 (1978), and the expression of Congressional intent concerning awards of attorney's fees set

forth in that opinion. Further, the present decision of the district court conflicts with decisions of other circuit court of appeals, in such cases as Skehan v. Board of Trustees, 590 F.2d 470 (3rd Cir. 1978), Pickett v. Millam, 579 F.2d 1118 (8th Cir. 1978), Miller v. Carson, 563 F.2d 741 (5th Cir. 1977), Morrow v. Dillard, 580 F.2d 1284 (5th Cir. 1978), over the issue concerning an award of attorney's fees against a state officer in his individual capacity.

ARGUMENT

The decision of the United States Court of Appeals Fifth Circuit in this case conflicts with decisions of appeals of other federal circuit courts, and with decisions of the United States Supreme Court, concerning the applicability of 42 U.S.C. §1983, to awards of attorney's fees against state officers in their individual capacities without any showing of subjective bad faith. This honorable Court should review that decision, resolve the conflict in the law among the several circuit courts of appeals, and correct an erroneous interpretation of the pertinent federal statute by the court below.

Although mail correspondence between inmates and individuals on the outside are protected in general by the First Amendment, this Court has recognized that limited censorship of such mail furthers the substantial governmental interests of security, order and rehabilitation. The First Amendment rights of inmates

has been expanding in recent times since the Supreme Court's decision in Procunier v. Martinez, 416 U.S. 396 (1974). The tremendous litigation in this area of inmates' mailing privileges emphasizes the uncertainty under which prison administrators must conduct their daily business. Petition disagrees with the conclusion of the Fifth Circuit Court of Appeals that this legal area was so well settled by federal court decisions that it was unreasonable for Petitioner to have censored in November 1975, Respondent's letter, pursuant to his official duties.

Under the legal standards and interpretations set forth in the circuit court's opinion, state officials performing discretionary decision-making in such legally sensitive and rapidly changing areas must act at their peril, and be held to a standard of legal knowledge in excess of what is reasonable. By allowing an award of damages and attorney's fees against such a state official, in his individual capacity, the Fifth Circuit Court of Appeals places too great a burden on such persons. For these reasons, the courts have established "good faith" standards which provide qualified immunity to state officers for acts done in accordance with their official capacities.

In this case, the Petitioner was performing his duties authorized by state regulation. His censorship authority is recognized as an acceptable practice by decisions of all courts, determining what types of mail are appropriate for transmittal. There was absolutely no showing

that Petitioner acted maliciously, or with any knowledge that such action was impermissable under current court decisions.

Petitioner further believes that his actions, contrary to the decisions of the district and circuit court in this case, were proper, even under those standards established by the United States Supreme Court for limiting mail censorship. Petitioner contends that the vulgar language contained in Respondent's censored letter was not speech within the scope of protections of the First Amendment. At minimum, legal arguments in support of the correctness of the censorship decision are not totally unreasonable nor frivolous, and the state officer involved in this action should not be subjected to personal awards of damages and attorney's fees because of after-the-fact conclusions that his action was inappropriate, without requiring a showing of bad faith. Petitioner did not perform the censorship involved in this case with any personal motivation, but acted entirely within his official duties, and in accordance with his good faith belief that his decision-making was in accordance with state regulation.

The decision of the Fifth Circuit Court of Appeals in this case, if allowed to stand intact, will have a serious negative impact on discretionary activities of state officers, in the State of Florida and through out the country. The standards of qualified immunity should protect such state officials in the realm of discretionary decision-making from

being held personally liable for damages and awards of attorney's fees, so long as they act in good faith, without personal malice, or without unreasonable disregard for the civil rights of others. The Petitioner submits that the correctness of the censorship decision made by him in 1975 was not "settled law" at that time, nor does he concede that the decision by the court in this case in 1979 was necessarily correct concerning the censorship.

For these important policy reasons, this honorable Court should issue a writ of certiorari and accept this decision for review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to JOHN P. McNAMARA, 200 S.E. 6th Street, Suite 300, Ft. Lauderdale, Florida 33301, this 12th day of February 1980.

Brian E. Norton

BRIAN E. NORTON

APPENDIX

JOHN P. McNAMARA,

Plaintiff-Appellee,

vs. NO. 77-2466

J. C. MOODY, etc.,

Defendant-Appellant.

United States Court of Appeals,
Fifth Circuit.

Nov. 15, 1979.

Appeal from the United States District Court for the Southern District of Florida.

Before GODBOLD, Circuit Judge, SKELTON* Senior Judge, and RUBIN, Circuit Judge.

GODBOLD, Circuit Judge:

Appellee is a prisoner in the Glades Correctional Institution at Belle Glade, Florida. He brought suit against two officials of that institution alleging that they had wrongfully prevented him from mailing certain letters. The district court found that appellant Moody, assistant superintendent of Glades, had violated McNamara's constitutional rights

by refusing to mail a letter to his girlfriend.[1] This two-page letter dealt in large part with McNamara's discontent with the prison mail censorship system, but it also charged that the mail censoring officer, while reading mail, engaged in masturbation and "had sex" with a cat. Moody found the part of the letter referring to the mail censoring officer to be "in poor taste" and returned it to McNamara with a warning that any future attempts to send similar letters would lead to disciplinary action.[2] The district court granted the prisoner injunctive relief, nominal damages against appellant individually, and attorney's fees.

[1] The law in this area has been well settled since the Supreme Court's decision in Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974). There the Court recognized that letters between inmates and individuals on the outside involve the First Amendment rights of the outside correspondents as well as those of the prisoners.[3] These rights are equally implicated regardless of whether the outsider is the sender or recipient. 416 U.S. at 408-09, 94 S.Ct. at 1808,

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* Senior Judge of the United States Court of Claims, sitting by designation.

1. The letter was addressed to "Mrs. John P. McNamara," but both parties refer to the intended recipient as appellee's "girlfriend."

The other letter involved in the case

1809, 40 L.Ed.2d at 237. The Court therefore set forth a rule that strictly limits prison censorship of such correspondence:

> [C]ensorship of prisoner mail is justified if the following criteria are met First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad.

416 U.S. at 413-14, 94 S.Ct. at 1811, 40 L.Ed.2d at 240.

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was one written to a member of Congress. It was rejected because it was not written on prison stationery. The district court found no constitutional infirmity in the prison stationery rule, and appellee does not press the point now.

2. The portion of McNamara's letter found to be offensive reads as follows:

[2] Appellant makes three attempts at identifying the required "substantial governmental interest." The first is his contention that to allow letters like this would result in "a total breakdown in prison security and discipline." This is similar to the contentions made by prison officials in Martinez and found unpersuasive by the Supreme Court. There it was claimed that mail containing "disrespectful comments" or "derogotory remarks", or statements that "magnify grievances" or "unduly complain" could be censored "as a precaution against flash riots and in the furtherance of inmate rehabilitation." 416 U.S. at 415-16, 94 S.Ct. at 1812, 40 L.Ed. 2d at 241. The Court found this an inadequate justification since the officials did not give any indication of what causal relationships there would be between such mail and these results. No one wants to be the target of insulting remarks like those in McNamara's letter. But coarse and offensive remarks are not inherently breaches of discipline and security, nor is there any showing that they will necessarily lead to the breaking down of security or discipline. As we have recognized, "Martinez . . . emphatically states that

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I wish I could write w/o some perverted dung-hole reading my words, but such is not the case. It is really a shame that there are those who have such a blah! life that they must masturbate themselves while they read other people's mail. I don't think the guy is married; however, one of the freeman told me the

mere complaints and disrespectful comments cannot be grounds for refusing to send or deliver a letter." Guajardo v. Estelle, 580 F.2d 748, 757 (CA5, 1978). Censorship for violation of prison disciplinary rules is properly limited to communications that relate to more concrete violations such as "escape plans, plans for disruption of the prison system or work routine, or plans for the importation of contraband." Id;[4] see Martinez, 416 U.S. at 413, 94 S.Ct. at 1811, 40 L.Ed.2d at 240. Appellant argues that if insults such as this were made orally to prison guards, face to face, they would be punishable as breaches of discipline. This may be so; we need not decide it. These remarks were in writing and were directed to the inmate's girlfriend, not the prison staff.

[3] Appellant contends that the letter "could also be considered obscene." Vulgar it is; obscene it is not. The Supreme Court, faced with a similar situation in Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971),[5] reminded that:

> Whatever else may be necessary to give rise to the States' broader power to

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other day that he has a cat and that he is suspected of having relations of some sort with his cat. If the shoe fits him. I'll point him out to you and you can laugh at him. "Look, honey. There goes that pervert who has sex with a cat and masturbates while

> prohibit obscene expression, such expression must be, in some significant way, erotic. . . . It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone . . .

403 U.S. at 20, 91 S.Ct. at 1785, 29 L.Ed. 2d at 291. Judged by this standard, the inmate's letter in this case is not obscene. We have held that there may be some prison censorship of sexually explicit materials that fall short of obscenity. Guajardo, 580 F.2d at 757. But under Martinez there must still be some connection to a governmental interest. In Guajardo that interest was the prohibition of materials that might exacerbate a prison problem of sexual attacks. Id. at 762. No such interest is implicated by the mailing of non-erotic vulgarities from a prisoner to a person on the outside.

Finally, appellant argues that the letter was libelous. Even if it is libelous, Martinez indicates that letters may not be suppressed simply because they are "defamatory". 416 U.S. at 415-16, 94 S.Ct. at 1812, 40 L.Ed.2d at 224. Here again

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> reading other people's mail." This is what I think of him. These are my thoughts, and I am entitled to them.

The full text of Moody's note to McNamara was as follows:

> I find your letter in poor taste and absolutely unacceptable for mailing from this institution.

there must be some relation to a substantial governmental interest, and the Appellant has advanced no such interest here. If the warden's purpose is to prevent strongly worded and exaggerated criticism of prison officials from reaching the public, this is precisely the sort of purpose rules impermissible by Martinez.

The district court awarded nominal damages of one dollar against Appellant individually. All the court said in support of the award is that despite lack of actual damages, "nominal damages may be presumed when constitutionally protected rights are violated," citing Sexton v. Gibbs, 327 F.Supp. 134, 142 (N.D.Tex. 1970), aff'd 446 F.2d 904 (CA5, 1971), cert. denied, 404 U.S. 1062, 92 S.Ct. 733, 30 L.Ed.2d 751 (1972). Appellant contends that he is immune from an award of damages because of his good faith. Although the district court did not address this issue in its order, we find no error with the award of damages.

[4] The Supreme Court has recognized that while 42 U.S.C. §1983 exposes state and local officials to individual liability for damages under some circumstances,

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> In the future you will refrain from derrogatory [sic] remarks about the mail room officers and their business. They have a job to do and I intend that they do it. There is not any intent on their part to harrass you or anyone else. I assure you that my patience is running very short with your juven-

Congress did not intend by enacting that section to strip such officials of immunity afforded them at common law. Procunier v. Navarette, 434 U.S. 555, 561, 98 S.Ct. 855, 859, 55 L.Ed.2d 24, 30 (1978). Some officials, such as judges, prosecutors, and legislators, are absolutely immune. Id. Most other officials have a qualified immunity for acts performed with a good faith belief, based on reasonable grounds, of their legality. Scheuer v. Rhodes, 416 U.S. 232, 247-48, 94 S.Ct. 1683, 1691, 40 L.Ed.2d 90, 103 (1974). This immunity varies according to the scope of the official's discretion and responsibility.[6] Id. Procunier v. Navarette, supra, establishes that it is this qualified immunity, as developed in Scheuer v. Rhodes and Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975), that applies to state prison officials. 434 U.S. at 561-62, 98 S.Ct. at 859-860, 55 L.Ed.2d at 30-31. We recently discussed the application of this test to prison officials:

> Wood v. Strickland clarified the Scheuer defense by establishing a dual test for measuring the existence of qualified immunity which requires both an objective and a subjective measure-

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ile antics.
The nest time you write a letter such as the one attached, you may be sure that you will meet with the disciplinary team.

3. The Court based the Martinez holding squarely on the First Amendment rights

> ment of official conduct. Under the objective test of Wood, an official, even if he is acting in the sincere subjective belief that he is doing right, loses his cloak of qualified immunity if his actions contravene "settled, indisputable law." Thus, an official is liable under section 1983 "if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights" of the person affected. The fulcrum of this objective first half of Wood is the existence, at the time of the official's action, of clearly established judicial decisions that make his action unconstitutional. An official is not "charged with predicting the future course of constitutional law." Navarette brought the objective part of the Wood formulation forward without alteration. . .

Bogard v. Cook, 586 F.2d 399, 411 (CA5, 1978) (citations omitted).[7]

[5] Under these principles, the evidence before the trial judge justified an award of damages against Appellant. He

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of the outside correspondents, thus avoiding the somewhat more difficult question of the scope of prisoners' First Amendment rights. The exigencies of prison administration justify some more stringent restrictions on prisoners' speech and association than would be permissible on the outside. Jones v.

made the decision not to allow the letter to be mailed and signed the note to the prisoner telling him that it was "in poor taste." For the reasons discussed above, suppression of the letter is clearly proscribed by the First Amendment. While the law on this subject was uncertain before Martinez,[8] that opinion brought clarity to the area. McNamara's letter was written over a year and a half after Martinez was decided. Under Bogard, Navarette, and Wood, the award of nominal damages must be affirmed.[9]

[6,7] Finally, the district court awarded costs and attorney's fees against Appellant, both individually and in his official capacity. In an action brought under 42 U.S.C. §1983, attorney's fees may be awarded to the prevailing party under the Attorneys' Fees Awards Act of 1976, P.L. 94-559, 90 Stat. 2641, 42 U.S.C. §1988. We have held that the award provisions are applicable to all cases that were pending, as was thi one, at the time of enactment. Rainey v. Jackson State College, 551 F.2d 672, 675 (CA5, 1977). Awards against an individual in his official capacity may be made; they are treated

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North Carolina Prisoners' Union, 433 U. S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977). The only aspect of Jones concerning communications between prisoners and those on the outside was its allowance of a prison rule against bulk mailings of literature for redistribution in the prison. In approving such a rule the Court stressed that it had

as awards against the state. Hutto v. Finney, 437 U.S. 678, 689, 98 S.Ct. 2565, 2573, 57 L.Ed.2d 522, 539-40 (1978). There is no Eleventh Amendment bar to such awards, and they need not be based on bad faith.

[8] A more difficult question is whether it was also proper to award attorneys' fees against Appellant in his individual capacity. At first glance an affirmative answer seems dictated by the statutory language. Appellee prevailed over Appellant in his individual capacity as well as in his official capacity by virtue of the award of nominal damages that we affirm. Such an award may be the basis of an attorney's fee award under §1988. See Perez v. University of Puerto Rico, 600 F.2d 1 (CA1, 1979). However, the legislative history of the Act casts some doubt on this conclusion. The Senate Report recommending passage of the Act stated:

> [D]efendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected

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no effect on communication between outside individuals and individual inmates. 433 U.S. at 128, 97 S.Ct. at 2539, 53 L.Ed.2d at 640.

4. In Guajardo we rejected the contention that a rule providing for censorship of letters concerning plans for the violation of prison rules was overly vague.

either directly from the official, in his official capacity[7] from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

[7] Proof that an official had acted in bad faith could also render him liable for fees in his individual capacity, under the traditional bad faith standard recognized by the Supreme Court in Alyeska, . .

S.Rept. 94-1011 at 5, 5 U.S.Code Cong. & Admin.News 1976, p.5908, at 5913 (1976) (footnote omitted). This passage appears to evince a congressional purpose not to subject state and local officials to liability for attorney's fees unless they act in bad faith according to the American common law standard mentioned in Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). However, the Supreme Court in Wood redefined bad faith to include both subjective and objective indicia. As Justice Powell noted, the majority opinion in Wood "explicitly equated" disregard of settled law with actual malice. 420 U.S. at 328,

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In so doing we relied upon our conclusion that, in light of Martinez, the regulation could not have been meant to apply to mere disrespect.

5. In that case the Appellant had been prosecuted for publicly wearing a jacket with the words "fuck the Draft" written on it. 403 U.S. at 16, 91 S.Ct. at 1780,

95 S.Ct. at 1004, 43 L.Ed.2d at 229. The district court's finding that Moody was guilty of objective bad faith therefore, under Wood, satisfies the congressional requirement that an official be guilty of bad faith if attorney's fees are to be awarded against him in his individual capacity.

Moreover, even assuming that the Alyeska standard requires subjective bad faith,[10] to apply such a standard would lead to an anomalous result. Prevailing Plaintiffs who are awarded only money damages against state officials (based on conduct found in bad faith under the objective part of the Wood test) would receive no attorney's fees under the Act. Were we to read the Senate Report as mandating such a result we would be creating a significant gap in §1988's coverage without any basis in the statutory language.

The Supreme Court has suggested a reading of the Senate Report passage that gives it effect without creating such a broad exception to the coverage of §1988. In Hutto v. Finney, supra, the Court in

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29 L.Ed.2d at 289.

6. Thus the district court was justified in imposing liability on Appellant Moody, who made the decision to suppress the letter, while not imposing liability on Defendant Fluharty, the mail censoring officer, who merely referred the matter to Moody.

discussing the passage, indicated that the Alyeska standard would be applied to officials "in injunctive suits." 437 U.S. at 699, 98 S.Ct. at 2578, 57 L.Ed.2d at 540. This interpretation, combined with the Wood test for immunity from damages, provides a reasonable accommodation of the conflicting interests involved. It also conforms with the natural reading of §1988, that wherever an individual damage claim can be sustained an individual attorney's fees award may be made. Since we find that Moody's conduct is not immune from damages under Wood, we affirm the district court's attorney's fee award.

AFFIRMED.

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7. Bogard then goes on to state that:

> Under that second branch of the offi- immunity doctrine, an official forfeits his immunity, if whatever the objective state of the law at the time of his conduct, his subjective intent was to harm the Plaintiff.

Id. This point does not concern us,

Footnotes Continued.

since there is no showing here of Appellant's subjective intent.

8. Before Martinez "the tension between the traditional policy of judicial restraint regarding prisoner complaints and the need to protect constitutional rights . . . led the federal courts to adopt a variety of widely inconsistent approaches to the problem [of prisoner mail]." Martinez, 416 U.S. at 406, 94 S.Ct. at 1808, 40 L.Ed.2d at 236. In Procunier v. Navarette, supra, the Court relied on this fact in holding that in the period 1971-1972 (before Martinez) there were no "clearly established" rights with respect to prisoner correspondence and that therefore officials could not be liable under Wood for infringing such rights. 434 U.S. at 562-65, 98 S.Ct. at 860-861, 55 L.Ed.2d at 31-33.

9. Our conclusion is not altered by the district court's statement in another part of its order that "[p]laintiff has made no showing that the withholding of Plaintiff's letter was done willfully, with reckless disregard for Plaintiff's rights." This observation was made with regard to an unrelated issue, the court's refusal (not challenged here) to award punitive damages. Thus it was not made in conjunction with a consideration of the "objective" part of the Wood v. Strickland test. Even if we were to consider this a relevant finding of fact, we are not bound by it, since our review of this case (submitted on stipu-

Footnotes Continued.
lations and documents without oral testimony) is not limited to the usual clearly erroneous standard. Nash v. Estelle, 597 F.2d 513, 518 (CA5, 1979) (en banc); Caradelis v. Refineria Panama. S.A., 384 F.2d 589, 593 (CA5, 1967).

10. We find no authority indicating whether an Alyeska bad faith award may be made in the absence of subjective bad faith. Because we decide this case on other grounds, we need not reach this issue.

SKELTON, Senior Judge, concurring in part and dissenting in part:

I respectfully dissent with respect to that portion of the majority's opinion which affirms the award of attorney's fees against the Appellant in his individual capacity in the absence of a finding that Appellant acted in bad faith. Such an award is, in my opinion, contrary to both Congressional intent and case law. I concur with respect to the remainder of the majority opinion.

Prior to the 1976 amendment to 42 U.S. C. § 1988 which authorized a court in its discretion to allow reasonable attorney's fees as a part of the prevailing party's costs, the Supreme Court set out the American rule and its exceptions for the award of attorney's fees in the case of Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). In this regard, the court stated:

> "Against this background, this Court understandably declared in 1967 that with the exception of the small amounts allowed by § 1923 [28 U.S.C. § 1923], the rule 'has long been that attorney's fees are not ordinarily recoverable . . ..' Fleischmann Distilling Corp. 386 U.S., at 717, 87 S.Ct. 1404, [1407] 18 L.Ed.2d 475. Other recent cases have also reaffirmed the general rule that, absent statute or enforceable contract, litigants pay their own attorneys' fees. See F. D. Rich Co., 417 U.S., at 128-131, 94 S.Ct. 2157, [2164-2166] 40 L.Ed.2d 703; Hall v. Cole, 412 U.S. 1, 4, 94 S.

Ct. 1943, 36 L.Ed.2d 702 (1973).

"To be sure, the fee statutes have been construed to allow, in limited circumstances, a reasonable attorneys' fee to the prevailing party in excess of the small sums permitted by § 1923. In Trustees v. Greenough, 105 U.S. 527, 26 L.Ed. 1157 (1882), the 1853 Act [Act of Feb. 26, 1853, 10 Stat. 161] was read as not interfering with the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit. That rule has been consistently followed. Central Railroad & Banking Co. v. Pettus, 113 U.S. 116, 5 S.Ct. 387, 28 L.Ed. 915 (1885); Harrison v. Perea, 168 U.S. 311, 325-326, 18 S.Ct. 129, [134-135] 42 L.Ed. 478 (1897); United States v. Equitable Trust Co., 283 U.S. 738, 51 S.Ct. 639, 75 L.Ed. 1379 (1931); Sprague v. Ticonic National Bank, 307 U.S. 161, 59 S.Ct. 777, 83 L. Ed. 1184 (1939); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970); Hall v. Cole, supra; cf. Hobbs v. McLean, 117 U.S. 567, 581-582, 6 S.Ct. 870, [876-877] 29 L.Ed. 940 (1886). See generally Dawson, Lawyers and Involuntary Clients: Attorney Fees From Funds, 87 Harv.L.Rev. 1597 (1974). Also, a court may assess attorneys' fees for the 'willful disobedience of a court order . . . as part of the fine to be levied on the Defendant[,] Toledo Scale

Co. v. Computing Scale Co., 261 U.S. 399, 426-428, 43 S.Ct. 458, [465-466] 67 L.Ed. 719 (1923),' Fleischmann Distilling Corp. v. Maier Brewing Co., supra, 386 U.S., at 718, 87 S.Ct. 1404, 18 L.Ed.2d 475; or when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . .' F. D. Rich Co., 417 U.S. at 129, 94 S.Ct. 2157, 40 L.Ed.2d 703 (citing Vaughan v. Atkinson, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962); cf. Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 580, 66 S.Ct. 1176, [1179] 90 L.Ed. 1447 (1946). These exceptions are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress, ..." (Emphasis supplied). 421 U.S. at 257-258, 95 S.Ct. at 1612, 1621, 1622, 44 L.Ed.2d at 153-154.

In addition to the statement of the rule and its exceptions, the court was careful to emphasize that it was the province of Congress and not the courts to determine when and if attorney's fees could be awarded. The Court stated as follows:

"Congress has not repudiated the judicially fashioned exceptions to the general rule against allowing substantial attorneys' fees; but neither has it retracted, repealed, or modified the limitations on taxable fees contained in the 1853 statute and its successors. Nor has it extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted. What

Congress has done, however, while fully recognizing and accepting the general rule, is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights. These statutory allowances are now available in a variety of circumstances, but they also differ considerably among themselves. Under the antitrust laws, for instance, allowance of attorneys' fees to a plaintiff awarded treble damages is mandatory. In patent litigation, in contrast, '[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party.' 35 USC § 285 [35 USCS § 285] (emphasis added.) Under Title II of the Civil Rights Act of 1964, 42 USC § 2000a-3(b) [42 USCS § 2000a-3(b)], the prevailing party is entitled to attorneys' fees, at the discretion of the court, but we have held that Congress intended that the award should be made to the successful plaintiff absent exceptional circumstances. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968). See also Northcross v. Board of Education of the Memphis City Schools, 412 U.S. 427, 93 S.Ct. 2201, 37 L.Ed.2d 48 (1973). Under this scheme of things, it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine.

"But the rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Court of Appeals." (Emphasis supplied). 421 U.S. at 260-271, 95 S.Ct. at 1623, 1628, 44 L.Ed.2d at 154-156 and 161.

With the language of Alyeska in mind, I now consider the legislative intent of Congress in enacting the 1976 amendment to 42 U.S.C. § 1988.[1]

On its face, the statute does not require any fact finding or other prerequisite prior to the award of attorney's fees; the matter is, of course, within the court's sound discretion. However, the legislative history behind the statute does present a different view. The Senate Report stated:

"[D]efendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either

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1. 42 U.S.C. § 1988, as amended, states in pertinent part as follows:
". . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or

directly from the official, in his official capacity,[7] from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." 94th Cong. 1976), U.S. Code Cong. & Admin.News, p. 5913.

[7]Proof that an official had acted in bad faith could also render him liable for fees in his individual capacity, under the traditional bad faith standard recognized by the Supreme Court in Alyeska. . ." S.Rep.94-1011 at 5. 94th Cong. (1976), U.S.Code Cong. & Admin. News, p. 5913.

It is obvious, therefore, that Congress did not intend for courts to abandon the "bad faith" requirement of the American common law recognized in Alyeska when awarding attorney's fees against officials in their individual capacity.

In Hutto v. Finney, 437 U.S. 678, 98 S. Ct. 2565, 57 L.Ed.2d 522 (1978), the Supreme Court had an occasion to consider the legislative history behind 42 U.S.C. § 1988.

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charging a violation of a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act or 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The Court noted that:

"The legislative history [of 42 U.S.C. § 1988] makes it clear that in such suits attorney's fee awards should generally be obtained 'either directly from the official in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).' S.Rep. No.94-1011, p. 5 (1976), [U.S.Code Cong. & Admin.News 1976, p. 5913.] Awards against the official in his individual capacity, in contrast, were not to be affected by the statute; in injunctive suits they would continue to be awarded only 'under the traditional bad faith standard recognized by the Supreme Court in Alyeska.' Id., at 5 n. 7, [U.S.Code Cong. & Admin.News 1976, p. 5913.] There is no indication in this case that the named defendants litigated in bad faith before the Court of Appeals. Consequently, the Department of Correction is the entity intended by Congress to bear the burden of the counsel fees award." (Emphasis supplied). 437 U.S. at 700, 98 S. Ct. at 2579, 57 L.Ed.2d at 540.

The majority implies that the court's reference to "injunctive suits" limits the "bad faith standard" to such suits. However, that is not the case. The only reason why the court mentioned injunctive suits was because that was the nature of the lawsuit before it. The Alyeska case and the Senate report upon which the Supreme Court in Hutto based its conclusion did not limit the bad faith standard to injunctive suits and neither did the court

in Hutto.

Therefore, it is apparent that Congress did not intend to repudiate the "bad faith" standard of American common law as a requirement to awarding attorney's fees against an official in his individual capacity.

In addition to the foregoing, two other circuits and, in at least two instances this circuit, have recognized that a finding of bad faith is a prerequisite to the award of attorney's fees against an official in his individual capacity. The cases are as follows:

(1) Skehan v. Board of Trustees, 590 F. 2d 470 (3 Cir. 1978). The court citing Hutto, supra, held that, based on the trial court's finding of no bad faith, the trial court correctly refused to grant an award of attorney's fees against a college president in his individual capacity. The court stated:

> "Thus, the district court's refusal to award fees to Skehan against defendant Nossen in his individual capacity could be affirmed on the basis of the court's factual finding that the defendants in this case had not pursued their defense in bad faith."
>
> . . .
>
> "That refusal must be viewed as a valid exercise of the court's discretion under the Act, given its previous determinations that Nossen was officially immune from damage liability and that he had not

> pursued his defense in bad faith." (Emphasis supplied). 590 F.2d at 495.

(2) Pickett v. Milam, 579 F.2d 1118 (8 Cir. 1978). In a suit against election commissioners, the court held:

> "We agree with the district court's finding that there is no indication that the appellees acted in bad faith. Thus, no award of attorney fees against the appellees in their individual capacities is justified. See Hutto v. Finney, supra, 437 U.S. 678, 98 S.Ct. 2565 at 2579, 57 L.Ed.2d 522. However, the specter of personal liability was removed by the Supreme Court's recent opinion in Hutto v. Finney, supra." (Emphasis supplied). 579 F.2d at 1120.

(3) Miller v. Carson, 563 F.2d 741 (5 Cir. 1977): In an action for declaratory and injunctive relief, damages and attorney's fees, this Court approved the award of attorney's fees based on the "bad faith" standard by saying:

> "A. The Civil Rights Attorney's Fees Awards Act of 1976
>
> We base our holding that the award was authorized on the Civil Rights Attorney's Fees Awards Act of 1976,[26] Pub. L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641, codified at 42 U.S.C. § 1988. That Act provides in relevant part: 'In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United

States, a reasonable attorney's fees as part of the costs."

[26]We affirm the trial court's finding that the plaintiffs are entitled to recover an attorney's fee from Sheriff Dale Carson in his individual capacity on the basis of the bad faith exception to the general rule that a party must pay his own attorney's fee. See 401 F. Supp. at 853-57 . . ." (Emphasis supplied). 563 F.2d at 754.

(4) Morrow v. Dillard, 580 F.2d 1284 (5 Cir. 1978). While discussing the legislative history behind 42 U.S.C. § 1988, this Court noted:

"The Senate Report [S.Rep.94-1011, 94th Cong., 2nd Sess.(1976)] also indicated that where a state official was guilty of bad faith, attorney's fees could be awarded against him in his private capacity under Alyeska." (Emphasis supplied). 580 F.2d at 1299, n. 18.

Furthermore, as a practical matter in the absence of a clear mandate from Congress, the detrimental effects of awarding attorney's fees against an official in his individual capacity in the absence of bad faith should be carefully considered. The possibility of such an award being granted would place an onerous threat and burden on officials in their exercise of the various duties and responsibilities of their offices. Faced with the possibility of having to pay large amounts as attorney's fees for even good faith errors, officials will be timid and reluctant to make even routine decisions. As a result, the effi-

cient administration and management of governmental offices will be adversely affected. The Supreme Court has recognized this undesirable result in at least two recent cases. In Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975), the court considered the liability of local school officials for their official acts. The Court observed that:

"We think there must be a degree of immunity if the work of the schools is to go forward; and, however worded, the immunity must be such that public school officials understand that action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity." (Emphasis supplied). 420 U.S. at 321, 95 S.Ct. at 1000, 43 L.Ed.2d at 224.

And in Hutto, supra, the court recognized that:

"This [requiring officers to pay attorney's fee awards instead of the state] is manifestly unfair when, as here, the individual officers have no personal interest in the conduct of the State's litigation, and it defies this Court's insistence in a related context that imposing personal liability in the absence of bad faith may cause state officers to 'exercise their discretion with undue timidity.' Wood v. Strickland, 420 U.S. 308, 321, 95 S.Ct. 992, [1000] 43 L.Ed.2d 214." 437 U.S. at

699, n. 32, 98 S.Ct, at 2578, n. 32, 57 L.Ed.2d at 540, n. 32.

Based on this rationale of the Supreme Court, it is clear that the Court did not intend that public officials could be "punished" by monetary awards being approved against them in their individual capacities for their official acts when they did not act in bad faith.

In conclusion and in summary, the award of attorney's fees against the officer in this case in his individual capacity, in the absence of a finding of bad faith, is contrary to both the unequivocal expression of Congressional intent and the prior holdings of the Supreme Court and of this and other circuit courts. Therefore, I would reverse the district court's award of attorney's fees against the Appellant in his individual capacity based on that court's finding that the plaintiff "made no showing that the withholding of plaintiff's letter was done wilfully, with reckless disregard for plaintiff's rights."[2]

I consider this to be a finding that the Appellant did not act in bad faith. Consequently, the judgment against him in his

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2. In the absence of evidence to the contrary, public officials are presumed to have acted in good faith. Greenway v. United States, 175 Ct.Cl.350 (1966), cert denied, 385 U.S. 881, 87 S.Ct. 167, 17 L.Ed.2d 108 (1966); Kozak v. United States, 458, F.2d 39, 198 Ct.Cl. 31 (1972); Kalvar Corp. v. United States,

individual capacity for attorney fees is erroneous.

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543 F.2d 1298, 211 Ct.Cl, 192 (1976), cert. denied, 434 U.S. 830, 98 S.Ct. 112, 54 L.Ed.2c 89 (1977); see United States v. Chemical Foundation, 272 U.S. 1, 47 S.Ct. 1, 71 L.Ed. 131 (1926), and Snowden v. Hughes, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. WPB 75-259-Civ-CF

JOHN P. McNAMARA,

Plaintiff,

vs.

J. C. MOODY, Assistant Superintendent of Glades Correctional Institution individually and in his official capacity, and LEE FLUHARTY, Correctional Officer and Mail Censoring Officer of Glades Correctional Insitution, individually and in his official capacity,

Defendants.

_____/

ORDER

This cause came before the Court on a joint Motion for Summary Judgment. The parties have agreed and stipulated that there are no genuine issues as to any material facts and have submitted the legal issues to the Court on the basis of the pleadings, the plaintiff's affidavit,

the defendant's depositions, the unilateral pre-trial stipulations and the parties memoranda on the issue of damages.

Plaintiff John P. McNamara is a prisoner incarcerated at Glades Correctional Institution. He has filed a civil rights action under 42 U.S.C. §1983 and 42 U.S.C. §1985 against J.C. Moody, Assistant Superintendent of Glades Correctional Institution and Lee Fluharty, Correctional Officer and Mail Censoring Officer of Glades Correctional Institution. Both defendants are sued individually and in their official capacities.

The parties have stipulated as to the facts which resulted in plaintiff filing this case. On or about November 24, 1975, plaintiff deposited two letters in the prison mail depository at Glades Correctional Institution. One letter was addressed to Congressman Lehman. The second

letter was addressed to Mrs. John P. McNamara. Both letters were returned to plaintiff by the prison staff. The letter to Congressman Lehman was returned because it was not on the approved prison stationery. The second letter which was addressed to Mrs. McNamara was returned to plaintiff because its contents was considered by defendant Moody to be obscene and possibly libelous. Attached to this second letter was a note from defendant Moody advising Plaintiff that "The next time you write a letter as the one attached, you may be sure that you will meet with the disciplinary team." The issue before the Court is whether the action of the defendants in refusing to mail the two letters in question constituted an abridgment of plaintiff's constitutional rights. Plaintiff seeks compensatory damages, punitive damages and an injunction

ordering the defendants to remove from plaintiff's inmate file all reference to the letters complained about herein, or any other letters from plaintiff to government officials which are in plaintiff's file.

Censorship or withholding mail is justified in a prison setting only where it (1) serves a substantial government interest such as security, order or rehabilitation, and is unrelated to suppression; and (2) the limitation on the First Amendment freedoms is no greater than is necessary. Procunier v. Martinez, 416 U. S. 396 (1974). Prison officials may not censor mail from prisoners merely because it is unflattering. Id. It is within the context of this law that the Court must consider defendants' actions.

The letter which the plaintiff attempted to send to Congressman Lehman was re-

turned by the defendants for failure to use the paper supplied by the prison and approved for prisoners' use. Denying plaintiff the use of the stationery of his choice is not a violation of any constitutional rights. See U.S. ex rel Dean v. Johnson, 381 F. Supp. 495 (E.D.Pa.1974); Gaito v. Ellenbogen, 425 F.2d 845 (3rd Cir. 1970). In this instance, plaintiff's First Amendment rights were not violated since plaintiff was not prohibited from writing the Congressman; in fact plaintiff had written numerous letters to Congressman Lehman which were mailed without any question. (It should be noted that Glades no longer requires prisoners to use prison stationery.)

The second letter which was returned to plaintiff and is the subject of this suit is a letter addressed to Mrs. McNamara. Defendants contend that this letter was

returned because it was obscene and because it would make the prison authorities a party to the libel. In Procunier v. Martinez, 416 U.S. 396 (1974) the Supreme Court affirmed the invalidation of regulations censoring statements which were deemed defamatory and held that unflattering and factually inaccurate statements could not be censored per so without showing that a substantial governmental interest is furthered by the censorship. Defendants contend that the censorship of plaintiff's letter to Mrs. McNamara served a rehabilitative purpose and therefore was not a violation of the standards set down by the Supreme Court in Procunier. The Supreme Court has noted that the weight of professional opinion seems to indicate that the freedom to correspond with outsiders advances rather than retards prisoner rehabilitation. Id. 416 at 412 n.13.

Even if censorship of mail had a rehabilitative purpose, the defendants in this case have offered no evidence to support the contention that the purpose of withholding the letter in question was rehabilitative and not suppressive. No evidence was offered that the defendant was counseled on the subject of the use of the mails, or that any action was taken by the defendants other than the writing of the note which was attached to the returned letter. If the purpose of mail censorship is rehabilitative and, as defendant Fluharty testified, 10% of the prisoners at Glades write communcations with derogatory remarks about the institution, it would seem logical that censorship would be used more frequently as a rehabilitative tool, rather than being the rare exception as defendants claim.

Defendant Moody testified in his deposition that the letter to Mrs. McNamara was withheld because it was obscene, and yet he was not able to define obscene or offer any standard used to determine what was, in fact, obscene. The defendant seemed to focus on the inappropriate nature of the communication, rather than its actual obscenity. Defendant Fluharty testified that he did not consider the letter to be obscene.

It appears to the Court, and the Court finds, that the defendants did not violate the plaintiff's constitutional rights by returning plaintiff's letter addressed to Congressman Lehman, under the Supreme Court standards, since the right to use personal stationery is not a constitutionally guaranteed right. However, defendant Moody did violate the plaintiff's constitutional rights when he withheld the plain-

tiff's letter to Mrs. McNamara. Since the defendant Fluharty merely referred the letter in question to defendant Moody, and was not aware of the withholding, he took no part in the constitutionally prohibited act, and therefore is not liable for any violation of the plaintiff's civil rights, either in his individual capacity or in his capacity as Correctional Officer and Mail Censoring Officer.

Inasmuch as the Court has found that defendant Moody's refusal to mail the plaintiff's letter to Mrs. McNamara was a violation of the plaintiff's constitutional rights, the Court must determine what damages, if any, plaintiff is entitled to receive. There is no proof in this case of actual damages, but this fact does not in itself defeat plaintiff's claim since nominal damages may be presumed when constitutionally protected rights are

violated. Sexton v. Gibbs, 327 F.Supp. 134 (D.C. Tex. 1970), aff'd. 446 F.2d 904 (5th Cir.), cert. denied 404 U.S. 1062. Punitive damages, however, may only be imposed if the defendant acted willfully and with reckless disregard for the rights of another. Adickes v. S.H. Kress Co., 398 U.S. 144, 233 (1970) (J. Brennan, concurring); Lee v. Southern Homesites, 429 F.2d 290 (5th Cir. 1970). Plaintiff has made no showing that the withholding of plaintiff's letter was done willfully, with reckless disregard for plaintiff's rights. Since any damages assessed against defendant Moody in his official capacity would in essence be recovered from the state treasury, no damages may be recovered from defendant in his official capacity since such damages would be barred by the Eleventh Amendment. Edelman v. Jordan, 415 U. S. 651 (1974). Plaintiff has also re-

quested injunctive relief requiring defendants to remove all references to the letter in questions from plaintiff's inmate file. Since the Court has found that the letter was wrongfully withheld, it is appropriate that any reference to the letter be expunged from plaintiff's records.

Accordingly, it is

ORDERED and ADJUDGED as follows:

1. Summary judgment is granted in favor of the defendants as to that portion of plaintiff's Complaint which relates to a letter addressed to Congressman Lehman.

2. Summary judgment is granted in favor of the plaintiff as to that portion of plaintiff's Complaint which relates to a letter addressed to Mrs. John P. McNamara, as against J.C. Moody only.

3. Judgment shall be entered for the plaintiff and against the defendant J.C. Moody, individually for the sum of one

Dollar plus costs and attorneys fees, as to the letter to Mrs. McNamara.

4. Defendant Moody, in his official capacity or his successor, is directed to remove any copy of the plaintiff's letter to Mrs. John P. McNamara or any reference thereto from the plaintiff's inmate files.

DONE and ORDERED at West Palm Beach, Florida on this 12th day of May, 1977.

CHIEF JUDGE

cc: Hubert R. Lindsey, Esq.
Anthony J. Golden, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. WPB 75-259-Civ-CF

JOHN P. McNAMARA,

Plaintiff,

vs. FINAL JUDGMENT

J.C. MOODY, etc., et al,

Defendants.

_____/

This cause came before the Court on a joint motion for summary judgment. The Court having considered the submissions of the parties and the pleadings, and having duly rendered an opinion, it is accordingly

ORDERED and ADJUDGED as follows:

1. The plaintiff John P. McNamara shall recover from the defendant J.C. Moody, individually, the sum of _____.

2. The defendant J.C. Moody, in his

official capacity, or his successor, is directed to remove any copy of the plaintiff's letter to Mrs. John P. McNamara which is the subject of this suit, and any reference thereto from the plaintiff's inmate files.

3. Plaintiff shall recover costs of this action and attorney's fees from the defendant J.C. Moody, individually and in his official capacity.

DONE and ORDERED at West Palm Beach, Florida on this 12th day of May, 1977.

_____
Chief Judge

cc: Hubert R. Lindsey, Esq.
Anthony J. Golden, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. WPB 75-259-CIV-CF

JOHN P. McNAMARA,

Plaintiff,

vs.

J.C. MOODY, etc., et al.,

Defendants.

_____/

NOTICE OF APPEAL

Notice is hereby given that J.C. Moody, Defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order and Final Judgment dated the 12th day of May, 1977 and filed the 24th day of May, 1977.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General
Tallahassee, Florida

ANTHONY J. GOLDEN
Assistant Attorney General
225 Pan American Building
West Palm Beach, FL 33401

Counsel for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Notice has been mailed this 10th day of June, 1977, to Hubert R. Lindsey, Esquire, Denco Building, 316 First Street, West Palm Beach, Florida.

_____
Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appendix has been mailed this 19th day of September, 1977, to Honorable Dennis Long, Farish & Farish, Denco Building, 316 First Street, West Palm Beach, FL 33401.

Of Counsel